FILE COPY

FILED
MAY 5 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 877, October Term, 1960

In the Matter
of
The Application of ROBERT E. FISCHER, Special Assistant Attorney General, for an Order revoking and/or modifying, etc., the sentence of HELEN DAVIS, also known as MAE THOMAS CRASKA, of July 14, 1959, in accordance with Sections 470-a and 935 of the Code of Criminal Procedure.

PEOPLE OF THE STATE OF NEW YORK,
Appellee,

against

HELEN CRASKA, also known as HELEN DAVIS,
Defendant-Appellant.

ON APPEAL FROM THE FINAL ORDER OF AN ASSOCIATE JUDGE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York

By ROBERT E. FISCHER
Special Assistant Attorney General
Counsel for Appellee
21 Hopper Street
Utica, New York

DAILY PRESS, INC., PRINTERS
UTICA, N. Y.

IN THE

Supreme Court of the United States

No. 877, October Term, 1960

In the Matter
of
The Application of ROBERT E. FISCHER, Special Assistant Attorney General, for an Order revoking and/or modifying, etc., the sentence of HELEN DAVIS, also known as MAE THOMAS CRASKA, of July 14, 1959, in accordance with Sections 470-a and 935 of the Code of Criminal Procedure.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

against

HELEN CRASKA, also known as HELEN DAVIS,
Defendant-Appellant.

MOTION TO DISMISS.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal in the above entitled case on the grounds that the appeal as a whole does not present substantial federal questions and two of the issues presented by way of appeal are not within the jurisdiction of the appellate processes of this Court, since not taken in conformity to statute.

Statement

This is an appeal from the final order dated December 30, 1960, of the Hon. Stanley H. Fuld, Associate Judge of the

Court of Appeals of the State of New York, denying appellant permission to appeal to that Court from the Order of the Appellate Division, Fourth Department, of the Supreme Court of the State of New York, entered December 1, 1960, unanimously affirming the order of the Extraordinary Special and Trial Term of the Supreme Court of the State of New York, which order revoked on April 14, 1960, a prior suspension of execution of sentence and imposed on appellant a sentence of one year to be served in the Oneida County Jail.

Appellant was indicted by a Grand Jury drawn for an Extraordinary Special and Trial Term of the Supreme Court of the State of New York for felonies and misdemeanors in connection with prostitution of women and the operation of a house of prostitution in the City of Utica, N. Y. and on July 14, 1959 was permitted to plead to one count of the indictment, a misdemeanor. Appellant was thereupon sentenced to:

> "Be committed to the Oneida County Jail for a term of one year, the execution of such sentence to be suspended during your good behavior. You are further fined the sum of $500.00 * * *."

The plea and sentence were founded upon a representation that defendant was then recovering from surgery.

Thereafter and on March 29, 1960, appellant appeared before a Grand Jury (then undertaking investigation of public corruption) pursuant to subpoena and was granted immunity by that Grand Jury under Section 2447 of the Penal Law of the State of New York. Appellant was examined concerning the means and method of escaping arrest for violation of the Penal Law in the operation of her house of prostitution during 1956 and 1957 and was again examined by the Grand Jury on March 31, 1960.

Thereafter and on April 5, 1960, appellant was served with an order of the New York State Justice presiding over the Grand Jury returnable April 8, 1960 requiring appellant to show cause why the suspension of execution of her sentence (by this same Court) should not be revoked and sentence executed pursuant to Section 470-a of the Code of Criminal Procedure.

The affidavit supporting the aforesaid Order to Show Cause alleged that appellant violated the "good behavior" condition of suspension of sentence by her conduct before the Grand Jury and had previously indicated her intention to tell the Grand Jury "nothing" in an intercepted telephone communication undertaken subsequent to being subpoenaed and before her appearance before the Grand Jury.

At the request of present counsel for appellant the hearing was adjourned for six days and on the adjourned date counsel requested particulars of the charges and contents of the Grand Jury Minutes, all of which were promptly furnished as requested prior to the conduct of the hearing.

The Minutes of the Grand Jury and the intercepted telephone conversation was properly identified, offered and received in evidence through witnesses subjected to cross examination. The appellant did not testify or offer any evidence in her own behalf. After hearing the testimony, reviewing the Grand Jury proceedings of March 29, 1960, and hearing argument from counsel for the People and the appellant, the Court:

> "Revoked the suspension of execution of sentence, which was ordered on July 14, 1959, and thereupon the sentence of the Court in your case is that you be committed to the Oneida County Jail for a term of one year."

The trial Court's findings included the improved health of the appellant and her statement regarding the same, and the conclusion of the Court that appellant's conduct before the Grand Jury was

> "Clearly inconsistent and incredible on its face, palpably false and patently untruthful and evasive, indicative of what the court would consider bad behavior."

The trial Court thereafter analyzed the source of the findings in the appellant's Grand Jury testimony:

> "It would appear there was a clear refusal on your part to testify factually as to why—what the foundation was for your supposition that you were to have only two girls in the house that you were operating. It was clear that you would not identify neighbors, who from your testimony, it would appear were very well known to you from long acquaintanceship. It would appear incredible that you couldn't identify persons who arranged for and received substantial sums of money for political contributions or tickets, whatever you want to call it. And, in the light of your announced intent as revealed in the telephone conversation and in the light of the whole tenor, the whole tone, in addition to the specific matters which I have pointed out here, of your Grand Jury testimony, the Court finds that in its moral judgment, let's put it that way, that your behavior has not been good behavior from the standpoint of the obligations of any ordinary reasonable citizen * * *".

Subsequently, appeal was had to the Appellate Division of the Supreme Court of the State of New York (Fourth Judicial Department), and the decision and judgment below were unanimously affirmed without opinion on December 1, 1960.

Thereafter, application was made to the Hon. Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, for permission to appeal to that Court.

which application after adversary argument was denied on December 30, 1960.

On January 5, 1961, Judge Fuld granted a stay of execution of sentence until January 16, 1961, thereby permitting appellant to make application to this Court for further stay of execution. By memorandum dated January 16, 1961, Mr. Justice Harlan denied the application of appellant for a stay at that time. Execution of sentence thereafter commenced on January 23, 1961. On February 16, 1961 the Appellate Division, Fourth Department, of the Supreme Court of the State of New York unanimously denied a further motion by appellant for a temporary stay of execution of the amended judgment.

ARGUMENT

POINT I

The Supreme Court of the State of New York properly received evidence of an intercepted telephone communication of the appellant.

The issue here presented has been passed upon by the United States Supreme Court in many instances and such is not violative of the United States Constitution.

Pugach v. *Dollinger*, 81 S. Ct. 650 (1961);
Olmstead v. *The United States*, 277 U. S. 438 (1928);
Schwartz v. *Texas*, 344 U. S. 199 (1952).

In addition, the declaration of the intent of appellant in her telephone conversation to tell the Grand Jury "nothing" provided only supplementary proof of "bad behavior."

POINT II

The hearing of August 14, 1960 did not violate appellant's rights under Amendment XIV of the United States Constitution.

The hearing at the trial level was conducted on notice, with a six-day adjournment to provide opportunity for preparation of counsel. Witnesses were presented and subjected to cross examination. The appellant was given full opportunity to be heard personally and by counsel. The analysis of the Grand Jury testimony by an experienced trial justice, as recited above, together with the various and lengthy analyses as made by both counsel during the hearing can only indicate that the Court's findings and decision were the result of careful and responsible consideration.

POINT III

The appellant's rights provided by Amendments IV, V, VI, VIII and XIV of the Constitution of the United States were not violated.

Although notice to the appellant and formal hearing were not required under New York statutes because of suspension of sentence (as distinguished from probation), the foregoing proceedings were undertaken as though appellant was a "probationer" to avoid any subsequent claim of lack of due process and proper hearing. The applicable portion of the New York Code of Criminal Procedure concerning suspension of execution of sentence follows:

470-a. *Suspension of sentence; suspension of execution of judgment.*

"* * * If sentence shall have been imposed and execution of the judgment suspended, the court may revoke the order suspending execution of judgment and order executed the judgment suspended or may modify the judgment so as to provide for the imposition of any punishment which might have been imposed at the time of conviction. The court may impose sentence or order judgment executed with or without modification as hereinabove provided at any time after such suspension of sentence or suspension of execution of judgment within the longest period for which the defendant might have been sentenced or, if the defendant is on probation and the period of probation exceeds the period for which the defendant might have been sentenced at any time while the defendant remains on probation; * * *"

When formal "probation" is ordered after sentence, the probationer is entitled to a hearing:

935. *Violation; revocation; modification; continuation.*

"Whenever within the period of probation any probationer shall violate his probation, the court may issue a warrant for his arrest and may commit him with or without bail. On his being arraigned and after an opportunity to be heard the court may revoke, continue or modify his probation. If revoked, the court may impose any sentence it might have originally imposed."

Those statutes permit the imposition of sentence previously suspended by the sentencing Court, in that Court's discretion and during the period of the suspension. Although the Courts of New York have concluded that notice and hearing are unnecessary for the exercise of discretion by the sentencing Court under the conditions here existing. *Ex Parte Kuney*, 5 N. Y. S. 2d 644, (Supreme Court, Special Term, New York County, 1938) aff'd Mem. 9 N. Y. S. 2d 403, aff'd Mem. 280 N. Y. 794; *People ex rel. Pascal* v.

Trombly, 173 App. Div. 497, 160 N. Y. S. 67 (Third Dep't 1916); *People* v. *Ottaway*, 247 N. Y. 493 (1928); *People* v. *Oskroba*, 305 N. Y. 113 (1953), the proceeding was here undertaken with all the formalities of trial, with adequate and timely review afforded. See also, *Burns* v. *United States*, 287 U. S. 216 quoted extensively in *Ex Parte Kuney*, *supra*; 5 N. Y. S. 2d at 644.

POINT IV

No substantial federal question has been raised.

The constitutionality of the statutes under which the sentencing Court was given discretion to revoke and modify its original sentence, *supra*, were not raised below or on appeal. Nor has issue been raised as to the adequacy of the notice and conduct of the hearing afforded. The sole substantial questions raised below and on appeal concerned the alleged "haste" with which the trial justice reached his decision, and the alleged misdirection of the discretion of the trial justice afforded him under the statutes of the State of New York.

The only other issue raised below concerned the impropriety of the receipt in evidence, at the hearing, of the intercepted telephone communication of the appellant.

(See Point I, *Supra*).

POINT V

The appellant's appeal is without merit.

This Court does not have jurisdiction to review the issues noted in Points II and III, *supra*, here presented by Notice of Appeal, the validity of those statutes of the State of

New York not having been raised below (28 U. S. C. 1257(2)).

CONCLUSION

It is respectfully submitted that the appeal should be dismissed for want of substantial federal questions and for lack of jurisdiction of this Court on appeal.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the State
of New York

By Robert E. Fischer
Special Assistant Attorney General
In Charge
Counsel for Appellee
21 Hopper Street
Utica, New York

Maxwell B. Spocnt
Of Counsel